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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of Part 95 of the Commission's
Rules to allow Interactive Video and Data
Service licensees to provide mobile service
to subscribers

WT Docket No. 95-47

RM-8476

To: The Commission

COMMENTS TO RULE MAKING

Brown and Schwaninger ("we")¹ hereby make comment in the above captioned rule making proceeding and request that the Commission consider the following in its deliberations regarding any proposed change in its existing rules.

When the Commission adopted its rules under Part 95 for the operation of IVDS systems, it was clear that the Commission did not intend that IVDS systems would be employed to create a service that could be construed as Commercial Mobile Radio Service. To the contrary, the Commission adopted rules which specifically barred the use of IVDS systems in such manner, see, 47 C.F.R. 95.805(d) which states that the operation of IVDS systems shall be "in conjunction with video and data delivery systems," (emphasis added), see also, 47 C.F.R. §95.805(f) which states, "[n]o IVDS system may render a common carrier service." These existing rules, in which the Commission does not propose any change within the instant proceeding, point clearly to the intent in adopting the original rules

¹ Brown and Schwaninger is a Washington, D.C. law firm which practices before the Federal Communications Commission, representing hundreds of licensees, commercial businesses, and persons who might be adversely affected by the outcome of this proceeding.

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which was that operation of IVDS systems would not create systems supported through the offering of messaging services, paging services, two-way conversational equipment, and the like.

We have no opposition to the Commission's adoption of rules which would provide flexible use of IVDS equipment to allow for mobile or portable use in practically any configuration in the delivery of interactive video and data services. Indeed, an ability to utilize flexible system design in the implementation of new services is often crucial to the success of a venture. We do, however, oppose any rule change which would create an ability for operators to employ IVDS systems for purposes which were unintended in the creation of the existing rules. Accordingly, the suggestion within the NPRM that an IVDS system be employed like a conventional community repeater, whereby end user/subscribers could communicate with one another, is contrary to the basis for the existing rules. This proposed use is tantamount to dispatch services and nothing within the legislative history of the existing rules suggests that the Commission intended IVDS operators to offer dispatch services, whether employing interconnection to the public switch telephone network or not.

At paragraph 4 of the NPRM, the Commission referenced EON's proposed use of the new flexibility requested in the proposed rules, to provide services which would "confirm a child's safety" or send an electronic message that says "come home now." This description of services is (employing the more typical vernacular of the industry) dispatch and paging services. Nothing contained within the Commission's earlier decisions, including those

which announced the procedures for participation in the IVDS auctions, suggested that bidders and operators would be able to provide such services, which clearly are not interactive video data services. Accordingly, if the Commission intended by its earlier decisions to provide such authority to operators, the Commission's earlier decisions did not clearly express this intention to the public and the commenting parties. This oversight would be particularly egregious here, where persons decided to participate (or not) in IVDS auctions based on the Commission's expressions within those earlier decisions. If the Commission inadvertently misstated its intention, then such error might negate the results of those auctions.

There is an element to be considered of fairness to all bidders for the IVDS spectrum. Many bid and some won. Had all bidders been in the position of those who are now winners and known that the Commission would propose to allow the winners to divert from providing IVDS and do something else instead, the identity of the winners might have been different and the treasury might have been the richer for it. This early in the history of the development of the IVDS is entirely too early for the Commission to give the winners of the auctions a windfall which might not have resulted had the Commission fully considered the proposed different services prior to the auction.

Perhaps what is in need of greatest clarification is what is intended by the Commission to be the primary service provided by IVDS operators and what measures the Commission is intending to take to assure that primary services are not rendered secondary

(or disregarded completely) in the use of the spectrum by IVDS licensees. Does the Commission intend to create wide-band paging systems which only incidentally provide interactive video services? Does the Commission envision the use of RTU's in the same manner which it envisions the use of alphanumeric paging receivers? Does the Commission have any concern as to whether dispatch services and paging services, employing IVDS equipment, would be used to cross-subsidize the nominal offering of video services? In sum, what is now the intention of the Commission in its proposals to permit dispatch and paging services (or messaging services) upon spectrum that was believed to have been allocated for interactive video services?

The public has an interest in receiving IVDS services which provide video **and** interactive transmission services. EON's proposals appear to separate the conjunction "and" contained within the Commission's Rules to provide a service which might provide, independently, video or data delivery, but not necessarily both in conjunction. If this is EON's intent and the nature of the Commission's proposal, then we oppose such proposal as unnecessary and not in accord with the earlier decisions of the Commission in the creation of the service.

No need for the proposed departure from the purpose of the IVDS has been demonstrated. The initially authorized IVDS systems are in their infancy and the public eagerly awaits their first interactive video data service offerings. Until such time as the IVDS licensees have provided substantial interactive video data service to the public, or until

they have tried and, in substantial numbers, failed in their efforts, the Commission's proposal to divert the scarce spectrum resources allocated to the IVDS would not be justified. If there is to be an interactive video data service provided, it will succeed only by the licensees' concentrating their efforts on that service, rather than by diverting their energies to other, unrelated services. To assure that the licensees concentrate their efforts on actually providing the IVDS for which they were authorized, the Commission should not adopt its proposals this early in the development of the IVDS.

The Commission's Rules and history of past rule makings to create spectrum allocations are rife with decisions which provide the ability of operators to provide messaging services. In each instance, the Commission clearly intended to provide this capacity to operators and the comments were submitted in full recognition of the Commission's intentions in creating those allocations. In this proceeding, the Commission is being asked by EON to rewrite its legislative history and amend its decisional language to create another messaging service, without any demonstration that such services are demanded by any segment of the public or that such service would serve any legitimate purpose other than providing IVDS operators the unexpected ability to provide services which were not proposed in their applications.

Perhaps EON's petition implicitly suggests that the Commission erred in allocating spectrum to the IVDS purpose. Perhaps, as with the Commission's allocation of spectrum to the Direct Broadcast Satellite Service (DBS), the allocation of spectrum to IVDS was

untimely, coming either too early or too late to facilitate a commercially viable service just now. If the IVDS licensees are convinced that they cannot create a successful business by providing IVDS service, perhaps the Commission should consider reallocating the spectrum immediately to other uses for which there may be greater demand, or, as it did with the DBS, simply wait for a more propitious time to arrive.

If the provision of IVDS services, as defined in the Commission's existing rules, is a economically feasible enterprise (as EON apparently believes), subsidization through the provision of unrelated services on IVDS spectrum is wholly unnecessary and should be rejected. But perhaps the most injurious potential of the Commission's proposed rules is to those persons and entities which made business decisions in reliance on the Commission's earlier decisions which did not suggest that the IVDS spectrum could be employed in this manner. EON's wholly creative application of the Commission's earlier decisions, insofar as the Commission would allow EON to create a dispatch or paging service, must be rejected to spare affected paging and dispatch operators from unwelcome surprise through the welcoming of an unwanted and unnecessary and unheralded entrant to the market.

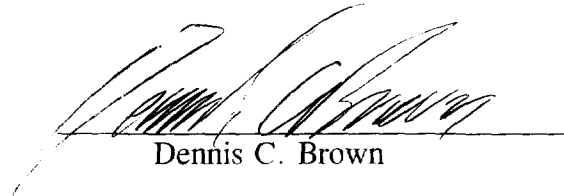
There is also an element to be considered of fairness to the public interest in obtaining full value for the commercialization of the public spectrum for IVDS. The public received a certain benefit by the deposit in the treasury of the winning bids. However, the amount of the winning bids did not reflect the commercial value of the additional non-IVDS services suggested by EON. To allow the winning bidders so soon after the auction to change the

essential nature of the authorized service, with no assurance that they will ever provide the IVDS for which they were licensed, would be to deny the public the full value to which it is entitled from the licensees in their auction bids. If the Commission is to so thoroughly change the nature of the service to be permitted by IVDS licensees so soon after the auction, it should either cancel all the licenses, return the winning bids, and rerun the auction under revised service rules, or it should deem the service offerings suggested by EON to be new services for which initial licenses are required, and either auction the right to provide those additional services in the IVDS spectrum, or require an additional contribution to the treasury by the current licensees who desire to provide those services.

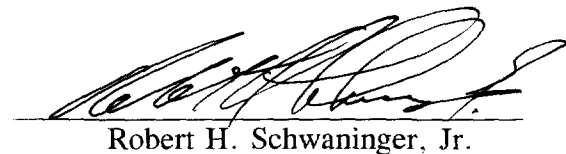
For the foregoing reasons, Brown and Schwaninger respectfully requests that the Commission reject any request to allow IVDS operators the ability to provide (1) any service which does not include the concurrent provision of interactive video and data service; (2) any service which is defined by other portions of the Commission's Rules as dispatch services or paging services or community repeater services; or (3) any ancillary service which was not clearly expressed in the Commission's decisions prior to the holding of the IVDS auctions which would work a surprise on the public and provide an unexpected windfall to the winners at the auctions at the expense of legitimate licensed paging and two-way operators.

Respectfully submitted,

BROWN AND SCHWANINGER



Dennis C. Brown



Robert H. Schwaninger, Jr.

Dated: 6/26/95

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, DC 20006
202/223-8837